

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

In re:	§ Case No. 10-80278-H3-11
	§
GALVESTON BAY BIODIESEL, LP	§ Chapter 11
	§
Debtor	§

**DEBTOR'S EMERGENCY MOTION PURSUANT TO 11 U.S.C. §§ 105, 361 AND 363
FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTOR TO USE
CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO THE PRE-
PETITION LENDER, AND (III) SCHEDULING A FINAL HEARING PURSUANT TO
BANKRUPTCY RULE 4001**

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 15 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing. Represented parties should act through their attorney.

The Debtor is seeking an emergency hearing on the interim request for relief prior to the fifteen day period.

Galveston Bay Biodiesel, LP ("GBB"), debtor-in-possession ("Debtor"), hereby moves this Court (the "Motion") on an emergency basis for entry of interim and final orders (i) authorizing the Debtor to use cash collateral, (ii) granting adequate protection to the prepetition lender, and (iii) scheduling a final hearing pursuant to Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this Motion, the Debtor respectfully represents as follows:

SUMMARY OF RELIEF REQUESTED¹

By this Motion, the Debtor seeks interim and final Court orders (the "Interim Order" and "Final Order") authorizing the Debtor to use Cash Collateral to operate its business and maintain the value of its estate, and interim and final Court orders granting adequate protection to Altira Group, LLC ("Altira"), the prepetition secured lender.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this case and this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409(a).

BACKGROUND

2. On May 10, 2010 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Court").

3. The Debtor has continued in possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been established.

4. GBB is a Texas limited partnership that was formed on December 9, 2005 to develop and operate biodiesel² production facilities. GCIP, LLC is the general partner, and 19 other individuals and entities have some limited partnership interest, including Standard

¹ Capitalized terms not defined herein are defined later in the Motion.

² See Affidavit of Rod Hayslett filed contemporaneously with this Motion for a more detailed description of the Debtor capital structure, business operations and summary of the events leading to the filing of this bankruptcy case.

Renewable Energy Group, LLC and Biodiesel 1, LLC, the only limited partners with more than a 7% partnership interest³.

5. The Debtor currently has 5 employees, but at its peak in 2008 it had over 30 employees. The Debtor's plant is located at 4828 Old Port Road, Galveston, Texas 77554. The Debtor leases the approximately seven (7) acres of land upon which the plant sits in Galveston from Sultex Ltd. ("Sultex"). The plant is located on the Galveston ship channel with ready access to ship, barge, rail and truck transportation.

6. The plant began operation in August 2007. From August 2007 until early summer 2008, significant modifications were made to the plant to increase its production capabilities. At the point of the beginning of production in the second week of September 2008, Hurricane Ike washed through Galveston causing about \$23.4 million in damages to the plant and business interruption claims.

7. In the summer of 2009, GBB attempted to restart the facility but numerous problems related to the hurricane and the delay caused by it severely limited the plant's capabilities.

8. The Debtor's insurance companies, Liberty Mutual Insurance Company and Ace American Insurance Company, failed to pay outstanding claims for property damage and business interruption caused by Hurricane Ike. As a result the Debtor has not been able to make necessary repairs to make the plant fully operational or to pay the numerous claims from vendors and suppliers incurred as result of the efforts to restore the plant after the hurricane.

9. In addition to the disruption caused by Hurricane Ike, in 2009 the Federal Government failed to issue new mandates for the use of biodiesel as required by law, and failed

³ See the List of Equity Interest Holders filed contemporaneously with this Motion for a complete list of the Debtor's equity interest holders.

to extend the tax credit to blenders for the blending of biodiesel. This has severely impacted the entire biodiesel industry.

10. The combined effect of the failure of the Debtor's insurance companies to honor its Hurricane Ike insurance claims and the industry impact caused by the lack of a biodiesel mandate have made it necessary for the Debtor to file this chapter 11 bankruptcy case. The Debtor's decision to file was hastened by the receipt of a Notice of Termination and Demand for Possession (the "Termination Notice"), received on March 22, 2010 from Sultex, the Debtor's landlord. The Termination Notice alleged payment and other defaults under the lease, and gave notice that the lease would terminate on April 7, 2010. The Debtor subsequently negotiated several extensions of the termination date, the latest such extension being May 12, 2010.

PRE-PETITION FUNDING OF THE DEBTOR'S OPERATIONS

11. In April 2006, the Debtor entered into a \$7.7 million loan agreement with Chevron Technology Ventures, LLC, Contango Capital Biofuels Partners, LP, Standard Pacific Capital Holdings, LLP, and Altira Group, LLC. Altira's participation in the loan was only \$200,000.

12. The loan agreement is purportedly secured by first priority security interests and liens on substantially all of the Debtor's assets, including but not limited to accounts, chattel paper, contract rights, equipment, inventory, fixtures, general intangibles, investment property, documents, letter of credit rights, deposit accounts, goods, buildings, water rights, plants, permits, development rights, land sale proceeds, insurance proceeds, condemnation proceeds, easements, leases, rents, other interests in land, and books and records (the "Pre-Petition Collateral").

13. Subsequently, each of the lenders with the exception of Altira, converted their loans to equity in the form of limited partnership interests. Altira did not convert its loan to equity.

14. As of the Petition Date, the Debtor was indebted to Altira in the aggregate principal amount of approximately \$306,249.07 (the "Pre-Petition Altira Debt"). Substantially all of the cash generated by the Debtor's business as of the Petition Date constitutes "cash collateral" as such term is defined in section 363(a) of the Bankruptcy Code and is subject to the alleged interests of Altira.

15. Upon information and belief, mechanic's and materialman's lien affidavits have been filed and/or sent to the Debtor's landlord Sultex in the amount of \$427,414.35 (the "Alleged M&M Liens"). The Alleged M&M liens do not attach to cash collateral and to the extent they do they are subordinate to Altira's liens in the Pre-Petition Collateral.

RELIEF REQUESTED

16. Pursuant to Bankruptcy Code sections 105, 361, and 363, the Debtor seeks authority on an interim and final basis to use cash collateral (as defined in 11 U.S.C. § 363(a)) (the "Cash Collateral") and to grant adequate protection to Altira. The Debtor requires the use of cash generated from its operations in order to continue to operate its business, to maintain going concern value of the business and to ensure that adequate funds are available for normal and customary business expenses and operating needs in accordance with the budget attached hereto as Exhibit "A".

17. The Debtor moves the Court to enter an order authorizing the Debtor to use Cash Collateral, while reserving the right of the Debtor and any Committee or trustee formed or

appointed in this case to object to the extent, priority, and validity of any alleged interest in this estate, including, without limitation, the Cash Collateral.

LEGAL BASES FOR RELIEF REQUESTED

A. Cash Collateral and Adequate Protection

18. The Debtor seeks to use Cash Collateral commencing immediately upon the Court's entry of the Interim Order. The Cash Collateral will be used by the Debtor to the extent necessary to meet its working capital needs to operate its business in the ordinary course and to pay the necessary costs of this bankruptcy case.

19. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may not use, sell, or lease cash collateral unless: "(a) each entity that has a interest in such cash collateral consents; or (b) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2). Section 363(e) of the Bankruptcy Code provides that "on request of an entity that has an interest in property . . . proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). Thus, the Court can approve the Debtor's use of Cash Collateral if the Debtor provides adequate protection to Altira. *See, e.g., In re Energy Partners, Ltd.*, 409 B.R. 211, 235-36 (Bankr. S.D. Tex. 2009).

20. The determination of adequate protection is a fact-specific inquiry to be decided on a case-by-case basis. *In re First S. Sav. Ass'n*, 820 F.2d 700, 710 (5th Cir. 1987) (nothing that adequate protection is determined on a case by case basis with a focus on protecting secured creditors from diminution in value of collateral); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996). The Bankruptcy Code does not define adequate protection but lists several

examples: (1) cash payments to the extent of any decrease in the value of a secured creditor's interest in collateral (2) replacement liens to the extent any decrease in the value of a secured creditor's interest in collateral and (3) other relief, other than an administrative expense claim, that provides the secured creditor with the indubitable equivalent of such entity's interest in the collateral. 11 U.S.C. § 361; *see Perez v. Peake*, 373 B.R. 468, 483 (S.D. Tex. 2007).

21. The section 361 list is non-exclusive and other factors can provide adequate protection. Other factors that can be considered include whether insurance is adequate, whether taxes are being paid, and whether the property is being maintained. *See In re Briggs Transp. Co.*, 780 F.2d 1348, 1349-50 (8th Cir. 1985). The Debtor intends to provide further adequate protection to Altira for the use of Cash collateral by offering to maintain the going concern value of Altira's alleged collateral by using the Cash Collateral to continue to maintain the Debtor's assets. *See In re First S. Sav. Ass'n*, 820 F.2d 700, 710 (5th Cir. 1987) (focusing on diminution in value of collateral).

22. The Fifth Circuit has further stated that in determining whether a secured creditor's interest is adequately protected, courts may engage in an analysis of the "equity cushion." *Mendoza v. Temple-Inland Mortgage Corp. (Matter of Mendoza)*, 111 F.3d 1264, 1272 (5th Cir. 1997). In *Mendoza*, the Fifth Circuit found that an equity cushion of 20% was sufficient adequate protection. As stated in the Affidavit of Rod Hayslett filed contemporaneously with this Motion, the liquidation value of the Debtor's property subject to Altira's liens is at least \$500,000.00, providing Altira an equity cushion of over 60% percent.

23. Further, the Debtor proposes to provide Altira with postpetition replacement liens—to the extent of any postpetition diminution in value of the Pre-Petition Collateral on: (1)

all of the Debtor's postpetition property of the same kind or character as the Pre-Petition Collateral, and (2) any proceeds or profits from the Pre-Petition Collateral.

24. The Debtor submits that the adequate protection discussed above and offered by the Debtor, provides Altira with adequate protection of its interest in the Cash Collateral. Thus, the Court should permit the Debtor to use Cash Collateral as requested herein.

B. Request for Immediate Interim Relief

25. Pending the Final Hearing, the Debtor requires immediate use of Cash Collateral in order to operate their business and maintain the going concern value of its estate for the benefit of all parties in interest. It is essential that the Debtor continue its operations, secure its property, maintain its plant, and continue paying for ordinary, post-petition operating expenses, including employee compensation, facilities maintenance, insurance, professional fees, and other general operating expenses.

26. Absent immediate use of Cash Collateral and financing, the Debtor will be unable to pay ongoing operational expenses and will be forced to convert this case to a case under chapter 7. Consequently, if interim relief is not obtained, the Debtor's assets will be immediately and irreparably jeopardized, to the detriment of their estate, their creditors and other parties in interest.

27. Accordingly, the Debtor requests that, pending the Final Hearing, the Court schedule the Interim Hearing as soon as practicable to consider the Debtor's request for authorization to use Cash Collateral, in accordance with and pursuant to the terms and conditions contained in the Interim Order.

28. Bankruptcy Rule 4001(b) permits a court to approve a debtor's request for financing during the 15-day period following the filing of a motion requesting authorization to

obtain post-petition financing, "only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Fed. R. Bankr. P. 4001(c)(2). In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. *See, e.g., In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990). After the 15-day period, the request for financing is not limited to those amounts necessary to prevent destruction of a debtor's business. A debtor is entitled to those amounts that it believes prudent in the operation of its business. *See, e.g., In re Simasko Prod. Co.*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985); *In re Ames Dep't Stores, Inc.*, 115 B.R. at 36.

29. For the foregoing reasons, the Debtor believes that granting the relief requested herein is appropriate and in the best interests of their estates.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Debtor requests this Court to enter Interim and Final Orders granting the relief requested and such other and further relief as the Court may deem just and proper.

Respectfully submitted this 11th day of May, 2010.

SELMAN MUNSON & LERNER, P.C.

By: /s/ Christopher D. Johnson

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PROPOSED ATTORNEYS FOR DEBTOR AND
DEBTOR-IN-POSSESSION

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing pleading has been served upon the parties listed on the attached Master Service List by electronic mail where available, or by first class mail, postage prepaid, on this 11th day of May, 2010.

/s/ Christopher D. Johnson
Christopher D. Johnson

Galveston Bay Biodiesel LP
8 WEEK CASH FLOW ANALYSIS

BEGINNING CASH
CASH RECEIPTS

CASH DISBURSEMENTS:

EMPLOYEE EXPENSES:
PAYROLL & RELATED TAXES
EMPLOYEE HEALTH & BENEFIT INSURANCE
EMPLOYEE EXPENSES
TOTAL EMPLOYEE EXPENSES

EQUIPMENT LEASES
FACILITY RENT
UTILITIES
BUSINESS INSURANCE
TAXES
MISCELLANEOUS PAYABLES
US TRUSTEE FEES
PROFESSIONAL FEES
TOTAL DISBURSEMENTS

NET CASH FLOW

CUMULATIVE DISBURSEMENTS

CUMULATIVE NET CASH BALANCE

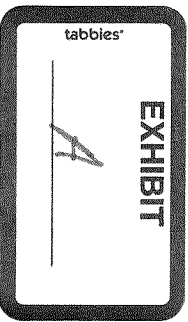
NOTES:

1 Base Benefits Costs (Medical, Dental & Insurance)

Notes	Week#							
	1	2	3	4	5	6	7	8
Wk Ending	Wk Ending	Wk Ending	Wk Ending	Wk Ending	Wk Ending	Wk Ending	Wk Ending	Wk Ending
5/14/2010	5/21/2010	5/28/2010	6/4/2010	6/11/2010	6/18/2010	6/25/2010	7/2/2010	
\$ 26,119.28								
\$ 34,694.81	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -

1	\$ 20,112.72	\$ -	\$ 20,112.72	\$ -	\$ -	\$ 20,112.72	\$ -	\$ 20,112.72
	\$ -	\$ -	\$ -	\$ -	\$ 5,574.66	\$ -	\$ -	\$ 5,574.66
	\$ -	\$ -	\$ 250.00	\$ -	\$ -	\$ -	\$ 250.00	\$ -
	\$ 20,112.72	\$ -	\$ 20,362.72	\$ -	\$ 5,574.66	\$ 20,112.72	\$ 250.00	\$ 25,687.38
	\$ -	\$ -	\$ 4,189.30	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ -	\$ -	\$ 571.76	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ -	\$ -	\$ 3,655.56	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ 23,080.20	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00	\$ 6,250.00
	\$ 49,442.92	\$ 6,250.00	\$ 35,029.34	\$ 6,250.00	\$ 11,824.66	\$ 26,362.72	\$ 6,500.00	\$ 31,937.38
	\$ (14,748.11)	\$ (6,250.00)	\$ (35,029.34)	\$ (6,250.00)	\$ (11,824.66)	\$ (26,362.72)	\$ (6,500.00)	\$ (31,937.38)
	\$ 49,442.92	\$ 55,692.92	\$ 90,722.26	\$ 96,972.26	\$ 108,796.92	\$ 135,159.64	\$ 141,659.64	\$ 173,597.02
	\$ 11,371.17	\$ 5,121.17	\$ (29,908.17)	\$ (36,158.17)	\$ (47,982.83)	\$ (74,345.55)	\$ (80,845.55)	\$ (112,782.93)

\$ 5,574.66



SERVICE LIST

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